

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
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DANIEL SMITH : NO. 05-227

MEMORANDUM AND ORDER

McLaughlin, J.

October 5, 2005

Daniel Smith is charged with various drug and firearms offenses. He moves to suppress (1) the evidence seized during a search of 512 High Street and (2) his statements made to the police before and after the search. The police entered 512 High Street by force and without a warrant. The question is whether they did so with probable cause and exigent circumstances. The Court concludes that the police had both. The Court will deny the motion.

I. Findings of Fact

On April 10, 2003, at approximately 6:00 a.m., law enforcement officers from the Montgomery County Detectives, Lower Providence Police Department, and Norristown Police Department executed a search warrant at 1222 Green Street. The warrant stemmed from a two-year long investigation of drug trafficking activity in Norristown, and was one of approximately forty warrants to be executed that morning in connection with the investigation. Lt. Mark Bernstiel of the Montgomery County

Detectives led the team executing the warrant at 1222 Green Street. Supp'n Hr'g Tr. 12:17-22, 54:10-13, 54: 1-3, Sept. 28, 2005.

The officers knocked on the door, then forcibly entered the residence. Richel Littlejohn and her two children were present, but the defendant was not. Lt. Bernstiel and Detective Charles A. DeFrancesco, a Lower Providence police officer assigned to the Montgomery County Detectives, spoke with Ms. Littlejohn. Then, at 6:20 a.m., Detective DeFrancesco took Ms. Littlejohn's statement. Ms. Littlejohn reviewed and signed the typewritten statement at 7:55 a.m. Id. at 67:18-24, 55:20-56:9, 70:16-25, 60:18-20; Govt's Ex. 3 at 1, 4.

Ms. Littlejohn identified herself as the owner of the residence and the former girlfriend of the defendant. Ms. Littlejohn told the officers that she had thrown the defendant out of the house three days earlier, and that the defendant was now staying at his mother's house at 512 High Street. Supp'n Hr'g Tr. 56:12-15, 60:2-11; Govt's Ex. 3 at 1.

Ms. Littlejohn stated that the defendant sold drugs and always had white powder in the house. She told the police that she had evicted the defendant after coming home to find the defendant with narcotics, including cocaine, in the house. She said that as she was evicting the defendant, she found and discarded an electronic scale, a bottle containing white powder,

a bottle marked acetone, and small plastic bags, all of which belonged to the defendant and were used by the defendant in his drug sales. She showed Lt. Bernstiel batteries and remnants of white powder on the sidewalk, where she had thrown the scale and poured out the contents of the bottles. Ms. Littlejohn further stated that the defendant had taken similar items to the 512 High Street residence. Id. at 2; Supp'n Hr'g Tr. 60:10-17, 78:10-22.

Shortly before 7:00 a.m., Lt. Bernstiel ordered six to eight officers to go to 512 High Street. Their initial purpose was to confirm whether the defendant actually resided there. Lt. Bernstiel remained at 1222 Green Street with three officers to finish taking Ms. Littlejohn's statement and to complete the search of the residence. Id. at 121:4-8, 108:6-9, 61:4-9.

At approximately 7:00 a.m., Norristown Police Sergeant Todd Dillon knocked on the door of 512 High Street. Sgt. Dillon saw the defendant look out the window, then immediately shut the curtain. Sgt. Dillon recognized the defendant from prior contacts in Norristown. Sgt. Dillon knocked again, announced that it was the police department, and called out to the defendant by name to open the door. The defendant did not open the door. Sgt. Dillon explained the situation to Lt. Bernstiel over the police radio. Lt. Bernstiel ordered Sgt. Dillon to secure the property. Id. at 109:16, 121:25-122:8, 107:24-108:18, 61:11-12.

Sgt. Dillon and the other officers forcibly entered 512 High Street. When they entered, the defendant was on the living room sofa. The defendant's mother, Joan Johnson, and cousin, John Smith, subsequently came downstairs. The defendant's dog tried to rush at the officers. The officers allowed Ms. Johnson to place the dog in a cage in the basement. The officers checked to make sure that there were no other persons in the house, and no weapons within reach of the residents. As they were securing the property, the officers saw a small bag of marijuana and a gray plastic bag containing white powder in plain view in the living room. The defendant made unsolicited statements that the items belonged to him. After securing the property, the officers waited with the residents in the living room and dining room areas. Id. at 108:21-110:12, 135:22-136:9, 114:13-115:10.¹

¹ The defendant and Joan Johnson, the defendant's mother, also testified at the September 28, 2005 evidentiary hearing. Their testimony differed from the officers' testimony in several respects. Ms. Johnson and the defendant testified that the officers did not knock and announce before forcibly entering 512 High Street, and that ski masks covered the officers' faces when they entered. The Court finds the testimony of Sgt. Dillon that he knocked, observed the defendant looking out the window, then knocked again and announced to be credible. Ms. Johnson also testified that the officers searched the house prior to obtaining the search warrant. Ms. Johnson said that when she was allowed to go upstairs to change out her nightclothes, she saw that the officers had opened drawers, moved the mattress, and opened the closet. Ms. Johnson testified that the warrant did not arrive until six hours later. The Court finds the testimony of Detective DeFrancesco to be more credible. Detective DeFrancesco testified that Ms. Johnson was still in her nightclothes when he arrived at 512 High Street with the warrant, and that he gave another officer permission to escort her upstairs to change after he had explained the warrant to her. Supp'n Hr'g Tr. 134:25-

Meanwhile, Detective DeFrancesco completed the interview of Ms. Littlejohn and prepared a search warrant for 512 High Street. Detective DeFrancesco drafted the warrant based on Ms. Littlejohn's statement as well as information he received from Sgt. Dillon regarding suspected drugs in plain view at the 512 High Street residence. Risa Ferman, First Assistant District Attorney for Montgomery County, reviewed the warrant. Assistant District Attorney Stephanie Shark and Detective DeFrancesco presented the warrant to Court of Common Pleas Judge William R. Carpenter at approximately 11:00 a.m. Judge Carpenter approved and sealed the warrant at 11:10 a.m. Id. at 90:6-91:10, 92:8-9, 99:10-21.

Detective DeFrancesco notified Sgt. Dillon and Detective Michael Altieri, a Montgomery County Detective who had arrived at 512 High Street after the initial entry, that he had obtained the warrant. The officers at 512 High Street began searching the residence. They seized a large quantity of suspected cocaine, small amounts of suspected marijuana and suspected hashish, a handgun, a shotgun, and other items. Id. 94:3-5, 115:11-17; Govt's Ex. 6.

When Detective DeFrancesco arrived at 512 High Street, he presented the defendant with the search warrant. The defendant made additional unsolicited statements that everything

135:16, 148:16-149:20, 121:25-122:8, 138:5-20, 169:9-16.

the police seized were his. Detective DeFrancesco read the defendant his constitutional rights, then arrested and transported him to the County Detectives' office. Supp'n Hr'g Tr. 94:9-18, 100:14-101:13.

Detective DeFrancesco read the defendant his rights again at the County Detectives' office. The defendant also reviewed and signed a form acknowledging that Detective DeFrancesco had read and explained his rights to him. Id. at 94:22-23, 95:14-96:3; Govt's Ex. 5 at 1.

The defendant then gave Detective DeFrancesco a statement. The defendant acknowledged that he sold cocaine. The defendant also acknowledged that the cocaine, marijuana, handgun, shotgun, and bulletproof vests the police seized from 512 High Street belonged to him. In response to the question "How were you treated by police today?" the defendant answered, "I say good. Great. Momma wanted to kick my ass." The defendant reviewed the statement, placed his initials next to each of his answers, and signed the statement. Id. at 2-4; Supp'n Hr'g Tr. 96:4-13.

II. Discussion

The defendant has moved to suppress evidence obtained pursuant to the search of 512 High Street and statements made by

the defendant to the police.² The Court finds that probable cause and exigent circumstances justified the officers' decision to enter and secure 512 High Street without a warrant. The Court further finds that there was sufficient probable cause for the search warrant that was eventually issued. Finally, the Court finds that the defendant's statements were made voluntarily.

A. Initial Entry into 512 High Street

The Fourth Amendment prohibits unreasonable searches and seizures. Warrantless searches are presumed to be unreasonable. See, e.g., United States v. Acosta, 965 F.2d 1248, 1251 (3d Cir. 1992). A warrantless search is justified, however, when police have probable cause to believe that contraband is present, and reasonably conclude that the evidence will be destroyed before they can obtain a search warrant. United States v. Rubin, 474 F.2d 262, 268 (3d Cir. 1973). Here, the officers did not have a search warrant for 512 High Street at the time they entered the residence. The Court finds, however, that the officers did have probable cause to believe that drugs and/or

² The defendant also moved to suppress the search warrant for 1222 Green Street. The defendant has conceded that he does not have standing to challenge the items seized from 1222 Green Street. Supp'n Hr'g Tr. 6:16-19; Def's Mem. at 2. The Court need not determine whether probable cause existed for the issuance of the 1222 Green Street warrant in order to determine the validity of the 512 High Street warrant, because Judge Carpenter did not rely on the former warrant in issuing the latter. Supp'n Hr'g Tr. 92:24-93:20.

other contraband were present at 512 High Street. The Court also finds that the officers reasonably concluded that the defendant would destroy evidence before they could obtain a search warrant.

1. Probable Cause to Believe that Drugs were Present at 512 High Street

The officers had probable cause to believe that drugs and other contraband were present at 512 High Street, based on facts contained in the affidavit of probable cause attached to the warrant for 1222 Green Street and information provided by Ms. Littlejohn that morning. The affidavit alleged that on April 2, 2003, a confidential source had informed the police that he/she had personal knowledge that the defendant sold cocaine; that the police had subsequently observed the confidential source making a controlled purchase of cocaine from the defendant; and that the defendant had been in communication with at least one of the main targets of the Norristown drug investigation on February 6, 2003. Govt's Ex. 1, Affidavit, at 23-26, 50-51.

The defendant contends that the search warrant issued for 1222 Green Street lacked probable cause, and that the Government is therefore barred from claiming that exigent circumstances justified the warrantless entry into 512 High Street. Even if the defendant had standing to contest the warrant for 1222 Green Street, which he concedes he does not, his

argument is inapposite. Even if the facts in the affidavit did not provide probable cause for the 1222 Green Street warrant, which the Court does not decide because the defendant lacks standing to challenge it, the facts in the affidavit plus the information provided by Ms. Littlejohn that morning did provide probable cause for the entry into 512 High Street.

Ms. Littlejohn confirmed that the defendant was a drug dealer and kept drugs and drug-related items in the house. Ms. Littlejohn told the officers that she had seen the defendant with narcotics, including cocaine, in the house just prior to evicting him. She stated that the defendant possessed bottles containing white powder and acetone, an electronic scale, and small bags, and told the officers that the defendant sold the cocaine in the small bags. She showed officers remnants of these items, and stated that the defendant had taken similar items to 512 High Street. Supp'n Hr'g Tr. 60:2-17, 78:10-22; Govt's Ex. 3.

The defendant argues that Ms. Littlejohn was not a credible source because she was angry with the defendant for having affairs with other women. The Court finds that it was reasonable for the police to conclude that Ms. Littlejohn was a credible source. Ms. Littlejohn's statements corroborated information contained in the affidavit, and were supported by evidence the police collected at her home. Ms. Littlejohn's statements, added to what the police already knew about the

defendant from the affidavit for the 1222 Green Street warrant, gave the police probable cause to believe that the defendant possessed drugs and other contraband at 512 High Street.

2. Exigent Circumstances Justified Warrantless Entry

In addition to probable cause, there must be exigent circumstances to justify a warrantless entry. Exigent circumstances exist when police officers reasonably conclude that evidence will be destroyed before they can obtain a search warrant. Rubin, 474 F.2d at 268; see also United States v. Velasquez, 626 F.2d 314, 317 (3d Cir. 1980); United States v. Davis, 461 F.2d 1026, 1030 (3d Cir. 1972). Factors courts have considered when evaluating whether circumstances justified a warrantless search include the degree of urgency involved, as well as the "ready destructibility of the contraband and the knowledge that efforts to dispose of the narcotics are characteristic behavior of persons engaged in the narcotics traffic." Rubin, 474 F.2d at 268-269. Officers need not have actual knowledge that the evidence is being destroyed. Id. at 268.

Here, the officers reasonably concluded that some degree of urgency was involved. Over forty search warrants stemming from the same investigation were scheduled to be executed at the same time that morning. Detective Eric

Echevarria of the Montgomery County District Attorney's Office's Detective Bureau testified that the warrants were scheduled to be executed as close to the same time as possible because the investigators were fearful that news of the warrants would spread and evidence would be destroyed. Before the officers executed the warrants that morning, Detective Echevarria briefed them on the importance of not allowing information about the warrants to spread. The officers were aware that numerous warrants were to be executed within a two square mile area in Norristown. Lt. Bernstiel, the team leader who ordered the officers to go to 512 High Street, testified that neighbors had already seen the officers on Green Street. Lt. Bernsteil further testified that, based on his experience in Norristown over a long period of time, news travels quickly in the town. He expressed concern that the defendant would be tipped off. The officers also knew from the affidavit of probable cause for the 1222 Green Street warrant that the targets of the investigation communicated with each other by telephone. Supp'n Hr'g Tr. 21:18-21, 22:22-24:25, 125:23-126:5, 83:2-9. See generally, Govt's Ex. 1, Affidavit.

The police went to 512 High Street to confirm that the defendant lived there. Sgt. Dillon knocked and observed that the defendant saw the police. Sgt. Dillon knocked again, announced that it was the police, and asked the defendant to open the door. The defendant refused to open the door. At this point, the

police reasonably concluded, based on their experience, that the defendant would try to destroy or remove evidence. See Ker et ex. v. California, 374 U.S. 23, 40 and n.12 (1963). In Ker, the Supreme Court noted that narcotics are readily destructible. Id. at 40.

The defendant argues that the police impermissibly created the exigency by knocking and announcing. The United States Court of Appeals for the Third Circuit has rejected this argument. United States v. Acosta, 965 F.2d at 1254 (following United States v. MacDonald, 916 F.2d 766, 771 (2d Cir. 1990)). In MacDonald, the United States Court of Appeals for the Second Circuit observed that it was proper and lawful for the officers to knock and announce. 916 F.2d at 771. The court reasoned that the fact that the officers might have expected, or even wanted, the defendant to react in a way that provided exigent circumstances did not make their knocking unlawful. The court held that "when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances." Id. at 772.

Here, the police acted lawfully in going to 512 High Street and knocking on the door to confirm that the defendant lived there. The police reasonably concluded that they could not employ other investigative techniques without tipping off the defendant. See Supp'n Hr'g Tr. 83:17-84:7. The police were

already equipped with tools for forcible entry for the execution of the search warrant at 1222 Green Street. The fact that the police brought the tools with them to 512 High Street does not make their actions unlawful. It was reasonable for the police to anticipate that forcible entry might be necessary if the defendant lived at the house.

B. Search Warrant for 512 High Street

The police entered and conducted a protective sweep of 512 High Street, but did not search the residence until the search warrant was issued. In issuing the warrant, Judge Carpenter relied on Detective DeFrancesco's affidavit of probable cause. The affidavit described the execution of the search warrant on 1222 Green Street that morning, Ms. Littlejohn's statements that the defendant was a drug dealer and kept drug-related items in the house, Ms. Littlejohn's belief that the defendant took similar items with him to 512 High Street, the police officers' entry into and protective sweep of 512 High Street, and the marijuana and bag with white powder the police saw in plain view during that sweep. Detective DeFrancesco's affidavit referred to the warrant and supporting affidavit for 1222 Green Street, but Judge Carpenter did not rely on that affidavit in issuing the warrant for 512 High Street. Govt's Ex. 4; Supp'n Hr'g Tr. 92:5-93:20.

Because the officers lawfully entered and completed a protective sweep of 512 High Street, Judge Carpenter was entitled to rely on the allegations that the police found suspected drugs in plain view at the residence. See Horton v. California, 496 U.S. 128, 136 (1990)(police may seize items without a warrant, so long as the item was in plain view, the police did not violate the Fourth Amendment in arriving at the location where the item was in plain view, and the incriminating nature of the item is immediately apparent). Therefore, there was probable cause for the search warrant for 512 High Street. The defendant has conceded that if exigent circumstances permitted entry into 512 High Street, probable cause would exist for the warrant. Def's Mem. at 10. Therefore, the Court will deny the motion to suppress as it pertains to evidence seized at 512 High Street.

C. Defendant's Statements

The Court finds that the defendant made certain unsolicited statements to the police prior to his arrest without any interrogation on the part of the police. The Court further finds that the defendant provided a formal statement to the police after he was duly informed of his constitutional rights, including his right to remain silent. Therefore, the Court will deny the motion as it pertains to the defendant's statements.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
DANIEL SMITH	:	NO. 05-227

ORDER

AND NOW, this 5th day of October, 2005, upon consideration of the defendant's motion to suppress and the government's opposition thereto, and after an evidentiary hearing on September 28, 2005, for the reasons stated in a memorandum of today's date, it is HEREBY ORDERED that the defendant's motion to suppress is DENIED.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.